

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, ADMINISTRATOR, ET AL.  
PLAINTIFFS

V.

JEFFREY DERDERIAN, ET AL.  
DEFENDANTS

C.A. NO. 04-312L

**PLAINTIFFS' REPLY MEMORANDUM IN RESPONSE TO "DEFENDANTS FOAMEX INTERNATIONAL, INC., FOAMEX LP AND FMXI, INC. AND GENERAL FOAM CORPORATION, GFC FOAM, LLC, PMC, INC. AND PMC GLOBAL, INC.'S OBJECTION TO PLAINTIFFS' MOTION TO AMEND" AND IN RESPONSE TO "DEFENDANTS' LEGGETT & PLATT INCORPORATED AND L&P FINANCIAL SERVICES CO. OBJECTION TO PLAINTIFFS' MOTION TO AMEND THE COMPLAINT"**

Defendants General Foam et als and Leggett & Platt et als have filed objections to Plaintiffs' Motion for Leave to File a First Amended Master Complaint. These Defendants claim Plaintiffs have unduly delayed in filing their motion to amend and, alternatively, that the proposed amended Counts as relate to them are "futile."

**A. THE PROPOSED MOTION TO AMEND WAS TIMELY FILED**

The "liberal" amendment policy of Rule 15(a) applies to Plaintiffs' Motion to Amend because:

1. It is still very early in the life of this case;
2. No discovery has been conducted at all, not even summary judgment discovery;
3. It is so early in this case that no scheduling order has been issued as of this date;
4. No summary judgment motion has been filed by any Defendant.

Defendants General Foam and Leggett & Platt seek the invocation of the Gold standard. See Resolution Trust Corp v. Gold, 30 F.3d 251 (1<sup>st</sup> Cir. 1994). However, as this court has stated, in the Almeida v. United Steelworkers of America International Union, AFL-CIO case, 50 F. Supp. 2d 115, at p. 120:

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“This heightened level of scrutiny is inapplicable to this Motion to Amend. The Gold standard has only been applied “where the motion to amend is made after a Defendant has moved for summary judgment.” Glassman 90 F.3d at 623. Defendants have moved to dismiss, not for summary judgment.”

Plaintiffs have earnestly and diligently attempted to place a motion for leave to amend their complaint before the court in a timely manner and at a very early stage of these proceedings. There is neither bad faith nor any dilatory motive. Again, Plaintiffs refer to this court’s decision in Almeida at p. 120 for the following relevant observation:

“Because of this court’s stay, the parties haven’t had the opportunity to engage in much discovery, therefore, Defendants cannot complain that the new allegations will require them to re-open their investigation of the charges and redesign their defense.”

There will be absolutely no prejudice to the Defendants if Plaintiffs’ motion to amend is granted. To the contrary, there will be a benefit to all involved insofar as there will be a detailed, organized Master Complaint in effect.

**B. THE PLAINTIFFS’ AMENDMENTS TO THE “FOAM” COUNTS  
ARE NOT FUTILE**

The counts in the proposed amended complaint as to these “Foam” Defendants are as follows:

1. Count LI - Leggett & Platt Incorporated – “Negligence”;
2. Count LII - Leggett & Platt Incorporated – “Strict Liability”;
3. Count LIII - Leggett & Platt Incorporated – “Breach of Warranty”;
4. Count LIV - L&P Financial Services Co. – “Negligence”;
5. Count LV - L&P Financial Services Co. – “Strict Liability”;
6. Count LVI - L&P Financial Services Co. – “Breach of Warranty”;
7. Count LVII - General Foam Corporation – “Negligence”;
8. Count LVIII - General Foam Corporation – “Strict Liability”;
9. Count LIX - General Foam Corporation – “Breach of Warranty”;

10. Count LX - GFC Foam, LLC – “Negligence”;
11. Count LXI - GFC Foam, LLC – “Strict Liability”;
12. Count LXII - GFC Foam, LLC – “Breach of Warranty”;
13. Count LXIII - Foamex LP – “Successor Liability for General Foam Corporation”;
14. Count LXIV - Foamex International Inc. – “Liability for Foamex LP”;
15. Count LXV - FMXI, Inc. – “Liability as General Partner”;
16. Count LXVI - PMC, Inc. – Liability for General Foam Corporation and GFC Foam, LLC;
17. Count LXVII - PMC Global, Inc. – Liability for PMC, Inc.

The Counts listed above are “stand alone” Counts insofar as all the other Counts against non-foam Defendants are concerned. This important point and its implications for Defendants alleged intervening superseding cause defense was described in oral argument by Plaintiffs’ counsel at the hearing held last Thursday, December 9, 2004. See Rule 8(e)(2). Rodriguez-Suris et al v. Montesinos, 123 F.3d 10 (1<sup>st</sup> Cir. 1997); Molsbergen v. United States, 757 F.2d 1016, 1018-19 (9<sup>th</sup> Cir.) (same), cert. dismissed, 473 U.S. 934 (1985).

The proposed changes made in these “Foam” counts, as amended, are as follows:

1. Breach of warranty claims are added against Defendants Leggett & Platt Incorporated (Count LIII), L&P Financial Services Co. (Count LVI), General Foam Corporation (Count LIX), and GFC Foam LLC (Count LXII).
2. More specific factual allegations are added directly to the Strict Products Liability Counts against Defendants Leggett & Platt Incorporated (Count LII), L&P Financial Services Co. (Count LV), General Foam Corporation (Count LVIII) and GFC Foam LLC (Count LXI). These more specific factual allegations also are incorporated by reference into the negligence and breach of warranty counts against these same Defendants. They are also incorporated by reference into the “successor liability” and “parental control” counts against Defendants Foamex LP (Count LXIII), Foamex International, Inc. (Count LXIV), FMXI, Inc. (Count LXV), PMC, Inc. (Count LXVI), PMC Global, Inc. (Count LXVII).

3. As is mentioned above, although these “foam” counts stand together as to each other (by incorporations by reference) they stand separate and apart from all other counts against all “non-foam related” Defendants<sup>1</sup>
4. A correction is made as to the Counts against Foamex International Inc. These are clearly successor liability and parental control claims against this Defendant. As originally pled, they were inadvertently set forth as negligence and strict liability claims.

C. **PLAINTIFFS’ “FOAM” COUNTS STATE CAUSES OF ACTION UPON WHICH RELIEF CAN BE GRANTED**

At this early stage of litigation, the legal standard to be applied in determining whether an amended complaint is “futile” is the same standard applied to determine whether a 12(b)(6) motion should be granted or denied. As Your Honor has stated in the Almeida case, at Page 120:

“Defendants object, claiming that the amendments are futile. Because the legal standard for determining the futility of an amendment is the same as that applied to a motion to dismiss for failure to state a claim, this Court will consider the causes of action presented by both the original Complaint and the Amended Complaint instead of treating the **Motion to Amend** and the Motion to Dismiss separately.”<sup>2</sup>  
(underline added)

The “foam” Counts in Plaintiffs’ Amended Complaint clearly state causes of action and claims upon which relief can be granted. Rule 8(a)(2) is more than satisfactorily complied with in each “foam” Count. A brief explanation follows below.

1. As to each foam-related, strict products liability count, the following specific, well-pled facts are set forth:<sup>3</sup>
  - A. The Defendants manufactured foam in question.

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<sup>1</sup> Although in Plaintiffs’ original Complaint there was an incorporation by reference as to other “non-foam Defendant” Counts, Rule 8(e)(2) does not allow these alternative claims to be used as admissions against Plaintiffs’ claims in the “foam” Counts. Rule 8(e)(2) specifically allows that Plaintiffs can make alternative claims in the same count.

<sup>2</sup> At oral argument, Plaintiffs’ counsel requested that the court follow the exact same procedure used in Almeida, that is to consider the Amended Complaint and the Motion To Dismiss together, not separately.

<sup>3</sup> Count LII is used for illustrative purposes.

- B. The Defendants' product was defective and unreasonably dangerous. See Paragraphs 513 (A-D), 515 and 516.<sup>4</sup>
- C. The Defendants' product was in the exact same condition as to the defects claimed at the time of the fire as when it was manufactured and sold. See Paragraph 517.
- D. Plaintiffs had no knowledge of the foams defective condition. See Paragraph 518.
- E. The defects in the Defendants' product were the proximate cause of the Station fire and the injuries and deaths in question. See Paragraphs 519 (Proximate Cause), 526 (Causation in Fact), and Paragraphs 520-523 (Reasonable Forseeability)
- F. The Defendants' foam was being used as intended. See Paragraph 520 C.
- G. There are also sufficient "well-pled" factual allegations as to each negligence, breach of warranty and successor liability and parental control Counts.

There is no real question but that Defendants have been given fair notice of the claims against them and the grounds upon which those claims rest.

For all the above reasons, Plaintiffs' request this Court grant their Motion for Leave to file Their First Amended Master Complaint.

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<sup>4</sup> The only direct defense attack on Plaintiffs' factual allegations are those against Plaintiffs' product stewardship claims. These specific allegations (Paragraph 513 (D) (1-4) clearly state that product stewardship is a "widely used practice that follows the use of raw materials, intermediate products and final goods through the design, manufacture, marketing, distribution, use and disposal to insure proper application and use in order to protect the public" (513) D (2). At oral argument Plaintiffs' counsel referenced an educational program held in May and October, 1995 held by the Defendants' industry association, the Polyurethane Foam Association, on this very subject. This educational proceeding was held years before Defendant sold their foam to American Foam Corporation. The product "Stewardship Code of Responsible Care of the Chemical Manufacturing Association was described to the Polyurethane Foam Association ("The Product Stewardship Code of Responsible Care was created to help members of the Chemical Manufacturing Association (CMA) incorporate environmental, health and safety protection into every facet of design, manufacture, marketing, distribution, use, recycle and disposal of chemical products. Unlike the other codes of Responsible Care, which deal mainly with manufacturing and transporting chemical products, the Product Stewardship Code covers a products entire life-cycle, from cradle to grave"). See documents allocated as Exhibit 1.

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## **Proceedings of the Polyurethane Foam Association Technical Program May October, 1995**

**Catalyzing Products Stewardship in Polyurethane's**, Charles M. Bartish, Air F and Chemicals, Inc., Proceedings of the Polyurethane Foam Association, May 18.

The product Stewardship Code of Responsible Care® was created to help membe Chemical Manufacturing Association (CMA) incorporate environmental, health a safety protection into every facet of design, manufacture, marketing, distribution, recycle and disposal of chemical products. Unlike the other codes of Responsible which deal mainly with manufacturing and transporting chemical products, the Pr Stewardship Code® covers a products entire life cycle, from cradle to grave.

In addition to providing information required by regulations, companies will now systematically review products and their uses, to be sure that all information nece safe handling, use and disposal of the product is known and communicated. Comj will also review each step in the product life cycle for every product family to see additional actions can be taken to further reduce the possibility of an accident or i

This paper discusses the general principles of Responsible Care and Product Stew what chemical producers and marketers will do as a result of implementing Produ Stewardship, and how customers will participate in the Product Stewardship proc

**Overview on the Concerns Facing Foam Fabricators from an Adhesive Supp Standpoint**, William Hazelgrove, Imperial Adhesives, Proceedings of the Polyur Foam Association, May 18, 1995.

For years the adhesive industry has been driven by the principal of the best produ the job, with efficiency being the key measurement of success. Now environment compliance must also be considered. Compliance is more than just meeting a stan involves a completed change of process and technology which affects the choice o equipment and attitudes of employees. Adhesive formulations are changing daily requirements of government agencies (OSHA and EPA).

This paper presents an overview of the changes brought about as a result of implementation of the Clean Air Act, and the subsequent elimination of 1, 1, 1, Trichloroethane and methylene chloride as solvents for adhesives are examined, a advantages and disadvantages of each are reported. The author feels that none of t alternatives (water based, hot melt, and flammable solvent) can be used without n modifications to process or operations.

**Control and Monitoring of VOC Emissions in Urethane Foaming Operations**, Charles Quinlan, KSE, Inc., Proceedings of the Polyurethane Foam Association, 1 1995.

# **PRODUCT STEWARDSHIP CODE OF MANAGEMENT PRACTICES**

## **Purpose and Scope**

The purpose of the Product Stewardship Code of Management Practices is to make health, safety and environmental protection an integral part of designing, manufacturing, marketing, distributing, using, recycling and disposing of our products. The Code provides guidance as well as a means to measure continuous improvement in the practice of product stewardship.

The scope of the Code covers all stages of a product's life. Successful implementation is a shared responsibility. Everyone involved with the product has responsibilities to address society's interest in a healthy environment and in products that can be used safely. All employers are responsible for providing a safe workplace, and all who use and handle products must follow safe and environmentally sound practices.

The Code recognizes that each company must exercise independent judgment and discretion to successfully apply the Code to its products, customers and business.

## **Relationship to Guiding Principles**

Implementation of the Code promotes achievement of several of the Responsible Care® Guiding Principles:

- To make health, safety, the environment and resource conservation critical considerations for all new and existing products and processes;
- To provide chemicals that can be manufactured, transported, used and disposed of safely;
- To support education and research on the health safety and environmental effects of our products and processes;
- To work with customers, carriers, suppliers, distributors and contractors to foster the safe use, transport and disposal of chemicals;
- To provide information on health or environmental risks and pursue protective measures for employees, the public and other key stakeholders;
- To practice Responsible Care® by encouraging and assisting others to adhere to these principles and practices.

## **Management Practices**

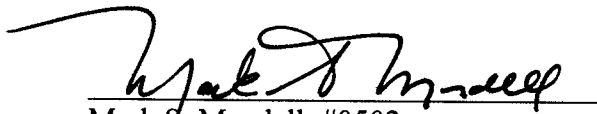
Each company shall have an ongoing product stewardship process that:

### **Management Leadership and Commitment**

1. **LEADERSHIP:** Demonstrates senior management leadership through written policy, active participation and communication.

Plaintiffs No. 13d and e, 17 through 63, inclusive,  
133 through 190, inclusive, and 225 and 226

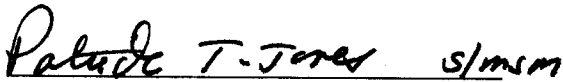
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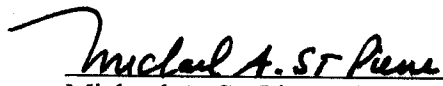
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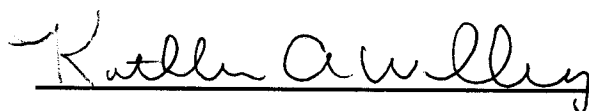
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